1926

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE CORVALLIS AND EASTERN RAILROAD COMPANY (a Corporation)

PLAINTIFF IN ERROR

VS.

THE UNITED STATES OF AMERICA

DEFENDANT IN ERROR

Brief of Defendant in Error

Upon Writ of Error to the United States Circuit Court for the District of Oregon.

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Attorneys for Defendant in Error.

PORTLAND PRINTING HO[illegible]O., TENTH AND TAYLOR STREETS

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STATEMENT OF THE CASE

Plaintiff in error will hereafter be designated as the railroad company and defendant in error as the United States, in accordance with the brief of plaintiff in error. The substance of the pleadings in the case are correctly set forth in plaintiff's brief and appear at pages 5 to 26 of the Transcript of Record herein.

Without going into details, it may safely be stated that the allegations of negligence in the complaint of the United States, were clearly proven. The railroad company's railway track and right of way extends through the Cascade Forest Reserve. Its right of way was acquired through unsurveyed public lands under the provisions of the act of March 3, 1875, and in accordance therewith is two hundred feet wide. The lands of the United States adjacent to the right of way, as well as the right of way itself, is covered with timber. The evidence showed that the right of way of the railroad company, at the points where the fires started, and in fact for a long distance in either direction therefrom, had never been cleared of brush, logs, rotten timber and other inflammable material which had accumulated upon the same since the construction of the road; that the only attempt made by the railroad company at any time to clear the right of way was the cutting of grass and ferns between the rails and for two or three feet outside thereof. The grass and ferns so cut were allowed to accumulate and lie upon the right of way just outside the rails, from year to year; that this accumulation of debris and inflammable material had become very dry and subject to ignition at the time of the fires in question, the season having been an especially dry one.

The evidence further showed that the fires in question were discovered a short time after an engine of the railroad company had passed; that when the engine mentioned reached the roundhouse, the engineer, on each occasion, reported that it had been throwing fire, and upon an examination thereof, shortly afterwards, a large hole was discovered between the netting and the rim of the stack to which said netting should have been fastened, through which large sparks, coals and cinders might have escaped; that this condition of the spark-arresting device could not have existed without negligence upon the part of the railroad company; that the railroad company did not maintain a system of inspections of the fire-arresting devices of its engines and did not examine the same until a report came in that an engine was throwing fire; that the engines passing over the road where the fires originated, were seen to emit large quantities of sparks and cinders of an unusual size shortly before and shortly after the fires complained of.

On July 23, 1906, shortly after train of railroad company had passed, fire was discovered on its right of way, which apparently had started in a rotten tie between the rails of its railroad track, or in inflammable material just outside of the track upon its right of way, and had spread therefrom to the timber belonging to the United States; that the wind was

blowing at the time, from the railroad track in the direction of which the fire travelled.

Again, on August 11, 1906, shortly after train of railroad company had passed, another fire was discovered which apparently had started in inflammable material a short distance from the railroad track and had spread therefrom to the timber of the United States. Evidence showed that this fire had either started in the dry grass or through inflammable material on the right of way, or in a pile of lumber near the track, or in an old cabin which existed near the railroad track, upon the right of way. The wind at the time was blowing in the direction in which the fire travelled. Evidence showed that there was no probable source in which these fires might have started other than the locomotive of the railroad company drawing the train which passed shortly before the fires were discovered. Both of the fires mentioned burned for several days and destroyed a large quantity of timber belonging to the United States.

The evidence clearly showed that the quantity of timber, claimed to have been destroyed in the complaint, was burned by the fires in question, and while all of said timber was killed by the fires and a portion thereof totally destroyed, part of said tim-

ber could have been put to a beneficial use and used if disposed of within one to five years after the fire, and that the timber which was thus killed but not destroyed was impaired in value from fifteen to forty per cent of its value immediately after the fire. In two years that said wood would be entirely destroyed and in about five years the timber would be a total loss.

It was further shown that the Forest Service of the United States attempted, after the fire, to dispose of this burned timber, but without success, except as to a small quantity thereof. The trial jury returned a verdict in favor of the United States against the railroad company for the sum of $4422.28, upon which verdict judgment was entered.

This action was brought to recover the sum of $10,754.44. Of this latter sum about $10,000.00 was claimed as damage to the timber injured and destroyed, and the remainder for expenses in preventing the further spread of the fires.

The jury, therefore, after returning to the Government the sum it expended in preventing the spread of fire and further destruction of timber, with interest thereon, gave to the Government approximately thirty-five per cent of the amount it

claimed the timber was worth immediately before the fire. While the testimony showed that the timber was worth somewhat more than the Government alleged its value to be, yet the court instructed the jury that a greater value than the Government placed on the timber should not be placed thereon by the jury.

ARGUMENT

I.

In the first subdivision of its argument, the railroad company complains of the introduction in evidence of certain letters written by the Forest Inspector of the United States to the railroad company, and the reply of the railroad company thereto. This complaint is the basis of the railroad company's assignment of error No. XVI (Transcript of Record, pages 380-382).

It is charged that the letters mentioned are self-serving declarations and are inadmissible because written while a controversy was impending. The authorities cited by the railroad company have reference to cases arising upon contract, and after a dispute had arisen as to the terms or meaning of the contract, and have no application to this case. The

letters complained of were offered in evidence for the purpose of showing that the railroad company had actual notice of the condition of its right of way and a clear apprehension of the danger to be anticipated by reason of the presence upon said right of way of large quantities of inflammable material.

While the printed record in this case does not show the purpose for which this testimony was offered or that any statement of its purpose was made, it was clearly competent, in a case of negligence to show that the company had knowledge of the conditions complained of prior to the occurrence of the fires in question and thus must have clearly apprehended the danger existing. Moreover, when the evidence was offered, it was clearly stated that the purpose of the same was to show knowledge upon the part of the railroad company of the condition of its right of way, bringing to their mind an apprehension of the danger existing. The letters were restricted to the purpose for which they were offered, as shown by the following transcript of the notes of the stenographer who took the testimony:

"MR. McCOURT: These letters are offered, if the Court please, for the purpose of showing knowledge upon the part of the railroad company of the condition of its right of way, and further, a notice

which brought to their mind an apprehension of the danger that already existed, and the damage which would occur, if they did not have it already — all within their duty as a railroad company."

"MR. FENTON: The objection to this is that the notice is immaterial, and that, insofar as it was the duty of the defendant railway company to protect its own property and to exercise ordinary care to not injure another—to protect from fire, debris, and things of that kind—it was its duty to do that as a matter of law; it required no notice. And further that the documents there contain self-serving declarations in favor of the United States, and would therefore be prejudicial—might be prejudicial, and might not be evidence that should be considered by the jury. No notice was necessary or material to charge a party in a matter of this kind."

"COURT: I suppose no notice was necessary to charge this company with negligence—with the result of their negligence in leaving this debris and inflammable material along that way."

"MR. McCOURT: I so understand the law."

"COURT: But I don't see that this letter, which is simply a notice to the company, calling its atten-

tion to that fact, would be of any special injury, and it does show notice to the company of the fact that it was claimed that their line was in this dangerous condition. I think the government is entitled to the testimony. I shall admit it."

While knowledge of the dangerous condition of its right of way, and apprehension of the danger therefrom is imputed to a railroad company, affirmative evidence in addition to the legal presumption is admissable.

Encyclopedia of Evidence, Vol. 9, page 890.

A common and frequent application of this rule is found in the introduction of evidence to sustain the presumption of good character and to show that a condition, or status, continues, which when once shown is presumed to continue as a matter of law. In this case, before the letters in question were introduced in evidence to show knowledge on the part of the railroad company of the condition of its right of way and the danger therefrom brought to its attention several months before the fires in question, a dozen or more witnesses had been called, all of whom had testified to the large accumulation of inflammable material on the right of way of the railroad company.

The purpose of the Forest Inspector in sending the letters to the railroad company was to notify it of the dangerous condition of its right of way and the necessity for taking precautions against the danger. The purpose of introducing the letters in evidence was to show that the railroad company had received the notice. No attempt was made to use as evidence the declaration, contained in the letters relating to the condition of the right of way. It was not necessary—a dozen witnesses had already testified to these same facts. The railroad company was in no way prejudiced by the admission in evidence of the letters in question and besides there was no error in admitting the same.

II.

The railroad company complains that the court permitted testimony to be introduced of repairs to the engine that it was claimed started the fire of July 23, 1906, and this complaint is set forth in its Assignment of Errors Nos. XIX, XX, XXI, XXII, XXIV and XXVI.

The evidence complained of in the Assignment of Error No. XIX, is found on pages 166 to 169, Transcript of Record.

And inspection of the record discloses that no objection was made by plaintiff in error to the tes-

timony included in said Assignment of Error No. XIX, except a motion was interposed to strike out that part of the testimony wherein the witness attempted to detail a conversation between himself and the engineer who ran the engine. Whereupon the court instructed the jury and the witness as follows:

"The conversation he had would not be competent in this case, but what he saw on examination of the engine would be competent."

"TO THE WITNESS: Counsel asks you what you did, what you know by your own examination, not what somebody told you."

The testimony of which complaint is made, in Assignment of Errors Nos. XX and XXI, is found on pages 169 to 170, Transcript of Record.

The objection of the plaintiff in error to the testimony set forth in Assignment of Errors Nos. XX and XXI, was made upon the ground that there was nothing in the pleadings charging negligence regarding the ash pans in the engine, and did not touch the question of repairs.

As to Assignment of Errors Nos. XXII, XXIV and XXV, there is nothing therein relating to the matter of repairs of which counsel complains. The purpose of the testimony contained therein was to sustain the allegation of plaintiff's complaint that the railroad company negligently permitted the spark and fire-arresting apparatus on its engines to be out of repair. It was later shown by the testimony of the witnesses of plaintiff in error that properly conducted railroads found it absolutely necessary to make regular inspection of their fire-arresting devices in order to properly guard against communication of fire by engines.

(Testimony of T. W. Younger, Transcript of Record, page 269.)

All of the testimony complained of, and given by the witness Jacob Merle, was given in response to the inquiry of defendant in error as to the condition of the spark-arresting devices, of the engine claimed to have set the fire of July 23, 1906, immediately after the fire. No question was asked as to the character of repairs made, or as to whether any repairs whatever were made upon the engine. If any testimony was given by the witness that the defects shown were repaired, it was merely incidental and voluntary. In fact there was no evidence

of that character given, sufficient to attract the attention of the court or jury, to the fact that the same was given. At page 168, Transcript of Record, the witness Merle after testifying to an extended examination of the spark-arresting device of the engine, after the fire of July 23, testified as follows:

> "And he got up on this engine and looked at the stack, and found between the casting of the trap door, where the man that had put the netting in did not have material enough to reach over to the flange, consequently he could take his rule by opening it two inches single thickness—two-foot rule—and put it between the casting and the netting; he went to work and got some pieces of netting."

The witness then continued without any question by defendant in error, or anybody else, as follows:

> "He (I) went to work and got some pieces of netting—the engine had to be used —and put in three different pieces, I think; they have six courses in that or more—the same stack went on the second engine; on that engine at that time I put them in and flanged them out, and that stack was all right after that."

No motion was made to strike out this testimony, and no objection was made to its introduction. Nor was the testimony called for by any question asked by defendant in error. At the time the testimony was given it was entirely competent in favor of plaintiff in effor, because if the engine had been repaired immediately after the fire of July 23, the defect shown would not have been the cause of the fire of August 11.

The witness later, however (Transcript of Record, page 169), said that "It was after the second fire that he located that stack." This latter statement was brought out by direct inquiry by the defendant in error, not for the purpose of showing subsequent repairs, but to ascertain whether or not the defective condition of the stack, shown to have existed at the time of the fire of July 23, still existed at the time of the fire of August 11.

The evidence complained of in Assignment of Errors Nos. XX and XXI, applied to the condition of the ash-pan of the engine immediately after the fire of July 23, and was elicited for the purpose of ascertaining whether or not the ash-pan was in such condition that coals and cinders would be readily dropped through from under the engine. (There was considerable evidence tending to show that one of

the fires originated between the rails of defendant's railroad track, and might have occurred from large coals dropped from the ash-pan of the engine.)

As above stated, the testimony regarding the ash-pan was objected to on the ground that the complaint did not include defects in the ash-pans of the engines. The witness was asked the following questions:

"Now, on these examinations, what condition did you find the ash-pan in? That is, the apparatus underneath to—"

The witness proceeded to testify as follows, without any further questions:

"Mr. Walsh had come and asked me to look over the ash-pans at that time, and we found the ash-pan netting—after looking at the stack and everything, he insisted on looking at all the ash-pans; they looked at engine one's ash-pan and the netting did not come to the mud-rim by two inches—the piece of netting; the ash-pan is maybe from eight to ten inches deep, and the netting came—it is bolted on with three bolts on the bottom of the ash-pan, two bolts on the side. There was a space of two inches. He looked through the wheel himself. He insisted on my putting a piece

of netting across. We did not bolt it on but sewed it on with wire, and it remained in that way that season." (Transcript of Record, page 169.)

The examination continued as follows:

"Q. What was there between this mud-rim and the piece of netting?

"A. There was nothing when the damper was open. When it was shut the damper was closed.

"Q. How much of an aperture for the escape of sparks and coals?

"A. You could put your arm through it; the full length of the ash-pan—the full width of it, and in one corner of that the ashes had accumulated all around. The ashes were kind of hot, and it bucked it up. I corked in asbestos, and kind of fixed it down."

The words underscored are the only ones that could be construed as constituting repairs. Said testimony was not objected to, nor was any motion made to strike it out for that reason. Moreover, the testimony was entirely competent to show the condition of the engine shortly, or immediately prior

to August 11, 1906. It is entirely clear that the testimony of the witness given, showed the defective condition of the fire-arresting apparatus of the engine prior to the fires. That is that the screen in the stack of the engine examined did not connect with the rim thereof, to which it should have been fastened, by an inch or more upon one side, and that there was an aperture between what is called the "mud-ring" and the top of the ash-pan, several inches in width, through which coals and cinders might escape or drop. These conditions were what was sought to be elicited by the questions asked of witness Merle. These were the facts brought out by those questions. In relating them Merle incidentally volunteered that when he discovered the defects he corrected them. Those voluntary statements on the part of Merle did not emphasize the presence of the defects in any respect.

If an effort had been made to show repairs, changes or precautions, made and taken after the fire for the purpose of having the jury infer therefrom that a defective condition existed prior thereto, then the evidence would have been objectionable, but where the defects were clearly shown it did not make them any greater or less because the witness volunteered that he corrected them. Therefore, the evidence complained of could not have in any way prej-

udiced plaintiff in error. Moreover, as has been pointed out, no objection was taken to the testimony nor was any motion made to strike it out, except upon the ground that the pleadings were not sufficiently broad to admit evidence relating to the ash-pan.

The railroad company, however, complain that notwithstanding the fact that they did not object to this testimony or make any motion to strike it out, still error was committed by the court in not instructing the jury to disregard the testimony. (Assignment of Error XXXIX.)

See Southern Pacific v. Hall, 100 Fed. 760, 768, where such refusal is held not to be error.

In the first place the evidence complained of was all directed to a time before the fire of August 11, 1906, and was calculated to show the condition of the engine immediately, or shortly before that fire.

In the next place, as has been pointed out, the testimony in no way prejudiced the railroad company, because it was not given to show negligence of the defendant. Negligence had already been amply and clearly shown by direct testimony. The faulty condition of the engine had been directly pointed out by direct and positive evidence. No inference of

defective condition from repairs was sought or required. For that reason there was no occasion for giving the instruction requested. Besides, the instruction requested did not apply to repairs, but to "changes or precautions adopted by defendant since those fires." There was no testimony of any changes or precautions adopted by defendant after the fires, nor was any attempt made to show that the railroad company had made any changes or taken any precautions to prevent a repetition of the injuries complained of. Therefore, there was no evidence in the record to justify the instruction asked, nor any contention made for the same.

III.

By its Assignment of Error No. XXXV, the railroad Company complains that the refusal of the court to give an instruction requested by it, and shown on page 32 of its brief. The burden of the complaint is that the court refused to instruct the jury that "It is only when the emission of sparks unusual in quantity or of extraordinary size is shown that a jury would be justified in inferring negligence."

The trouble with the assignment of error is that the court gave an instruction completely covering this matter. The court instructed the jury as follows:

"The mere fact that just prior or subsequent to, or about the time of the fire, or at any time testified to by witnesses, the engines scattered sparks, is not, of itself, sufficient to impute negligence to the defendant, because it is practically conceded that an engine properly equipped will, under some circumstances emit sparks of some character. It is only when it appears that sparks are emitted in unusual quantities or of unusual size, that there would be any presumption of negligence in the construction, repair or operation of the spark-arrester, or other appliances used by the defendant."

(Transcript of Record, page 341.)

"All the law required of the defendant is the exercise of ordinary and reasonable care, such care as an ordinary reasonable person engaged in that business and under all the circumstances would have exercised, and if it does that it has exercised all the duties the law can impose upon it. It is not an insurer. It does not guarantee nor is it required to guarantee that no fire will issue from the engine or no sparks will issue from the engine, but it is required to exercise reasonable care to keep its right of way free from inflammable material so that fires that

> naturally drop from the engines will not communicate to the adjacent property, and it is also required to exercise reasonable and ordinary care to provide its engines with the latest, approved appliances to prevent the escape of sparks and fire, and to keep such appliances in repair, and to provide skillful and competent servants to operate its egines and to see that they operate them in a skillful and proper manner, so that fire will not escape. When it has done all this, then it has discharged the duties the law imposes upon it, and it would not be liable, but if it fails to do so, then it is liable for the consequences of its negligence."

(Transcript of Record, page 339.)

The court's instructions fully cover the matter complained of and there was, therefore, no error.

IV.

The railroad company, in its Assignment of Error No. XXXVI, complains at the refusal of the court to give the following instructions:

> "I instruct you that under the law and the evidence in this case, the United States, by its officers and agents, had authority to sell this burned timber, either with or with-

out any other timber that might be left standing. If you find from the evidence that if the United States, by its officers and agents in charge, by the exercise of reasonable diligence, could have sold the burned timber and realized therefrom so as to reduce the damage which may have been caused by the fire, then the plaintiff in this case would not be entitled to charge the defendant for any damages which could have been thereby avoided, even though you find that the defendant negligently caused the damages or some portion of the damages claimed on account of either of the fires respectively. By this I mean that if the timber which was burned over could by reasonable diligence have been sold for as much as the plaintiff claims such timber was worth at the time, and if such sales could have been made within a period of two or three years, and thereby the damages reduced or wholly avoided, then to the extent that the plaintiff could have reduced such damages by such sale, even though it was the full value of such timber, the plaintiff would not now be entitled to charge the defendant therewith."

(Transcript of Record, pages 395-396.)

"And if you find from the evidence that the United States by its forestry officers or other persons having charge of its business,

attempted to sell or offered for sale this burned timber at a price beyond its market value, as I have defined it, then the fact that there was no sale under such circumstances would be no evidence that the plaintiff had used reasonable diligence in attempting to make such sale or in attempting to avoid the loss caused by such fire or fires."

(Transcript of Record, page 396.)

Complaint is also made in Assignment No. LXII, because the court gave the following instruction:

"Now in this, as in all cases, it is the duty of a party to reduce his damages as much as can reasonably be done under the circumstances, and therefore, if you believe from the testimony that after this timber had been burned, it could have been disposed of by the Government officials for any sum—according to what sum it could have been disposed of, if it had an opportunity to sell it—it was, I think, its duty to have done so and thus reduced the damages, but in determining that question, and in examining that view of the question, you will not overlook the fact as to whether there is a market for the sale of this timber; whether they had an opportunity to sell it; whether they could have disposed of it, and all the circumstances that surrounded the location

> and condition of this particular timber now in controversy. If these people could have sold this timber—if there was a market for it and they could have sold it and gotten something for it—it was their duty to do so and reduce the damages. If, on the other hand, they could not sell it, they were not negligent in failing to do so, and the Government would be entitled to recover whatever damages it sustained by reason of the fire."

Plaintiff in error complains that the instruction given by the court omitted the element of reasonable diligence which should have been imposed upon defendant in error in disposing of the damaged timber, and also that it submitted to the jury the question of whether or not there was a market for this injured timber.

T. H. Sherard, Supervisor in charge of the Oregon National Forest, testified that the timber burned had been for sale ever since the fire, and that a diligent and vigorous effort had been made to sell the same and that green timber was offered in connection with the burned timber in order to facilitate the disposal of the burned timber; that they offered the burned timber at any price, and went around among possible purchasers and endeavored to induce the latter to purchase said burned timber.

(Transcript of Record, pages 247-255 and 256.)

The court, however, further instructed the jury as follows:

> "I do not understand that one can negligently and carelessly cause a fire in a timber claim belonging to another, and then respond in damages to the full extent that the other suffered by reason of that fact because the timber would, from a speculative standpoint, be worth more money. Whether it is worth anything or not, is of course dependent upon the market. After the timber is killed, the testimony in this case shows it will decay, and it will decay in a certain length of time. Now, if during that time, before it decayed, there was no market for the timber, no opportunity to sell it, no means by which a man could get any money out of it, the fact that it may have a speculative market value ought not, it seems to me, to be a reason why the damages should be reduced, provided the owner of the property **exercised reasonable care and diligence and effort to dispose of the property and reduce the damages to the smallest possible extent,** and in that view you have a right to consider this question as it appears from the testimony in this case."

(Transcript of Record, pages 346-347.)

It is submitted that when the entire instruction of the court is taken into consideration it covers all of the objections urged by plaintiff in error.

V.

Plaintiff in error by its Assignment of Errors Nos. XXXVII and XXXVIII (Transcript of Record, pages 396 and 397) complains of the refusal of the court to give the instructions requested by plaintiff in error and set forth in said assignment of errors. Under this head the main proposition laid down in the points and authorities and argument of railroad company is stated in the following language:

> "Where trees are destroyed by the negligence of another, the owner may bring an action either for the value of the trees so destroyed or for the injury to the land. If the owner brings the former action, the proper measure of damages is the market value of the trees destroyed independent of the land. If he brings the latter action the measure of damages is the diminished market value of the land, resulting from such destruction of the trees thereon. Where trees are injured by a fire by the negligence of another, but not destroyed, the owner may bring an action for the injury to the trees or for the injury of the land. In either

case the measure of damages is the difference between the market value of such trees or land immediately before and immediately after the fire."

In its argument plaintiff in error complains that the court instructed the jury on the measure of damages as follows:

"In arriving at the damage, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of the timber, both burned and unburned, immediately after the fire, and the difference between such market values if any, will be the damage sustained by the plaintiff **to this land and the timber thereon.**"

(Transcript of Record, pages 344-345.)

No exception was taken by the plaintiff in error to the instructions given by the court on the measure of damages.

The railroad company complains in its argument that the instruction given allowed the jury too much latitude; that it allowed them to consider not only the injury to the timber but also the injury to the land.

While the complaint alleges generally that the plaintiff was damaged in the sums sought to be recovered by reason of the destruction of the timber in question, no effort was made to show that any damage had occurred to the land upon which the timber stood, but the evidence was directly entirely to the matter of the damage to the plaintiff by reason of the destruction of the timber. The Court carefully restricted the jury to the damages suffered by plaintiff by reason of the destruction of the timber. The jury was plainly told that in this case as it had been presented to them, the difference between the market value of the timber immediately before the fire and its market value immediately thereafter, constituted the damages sustained by the plaintiff, and their verdict thus reached would compensate the government for the injury to its land as well as the timber thereon. They were in effect instructed that if there was any injury to the land it had not been claimed or proved, and that the injury to the timber would cover the damages to both the timber and the land so far as this case was concerned. In other words, the jury might disregard entirely the question of injury to the land.

The Court instructed the jury upon the matter under consideration as follows:

"The measure of damages in this case is the difference, if any, between the value of this timber immediately before the fire and immediately after. I **think it probably can be assumed from the way the case been tried, and from the record in this case, that the value of this property consisted in the timber, and that the land, without the timber, is of no special value, at least the evidence has all been directed to show the amount of timber destroyed, and its value.** Of course the land belongs to the Government of the United States, and there is no law I believe, under which it could be disposed of, but there is a law authorizing the sale of timber from Government reserves under certain conditions and restrictions, and therefore, in arriving at the damages, if any, sustained by the plaintiff, it will be your duty to take into consideration the market value of the timber, both burned and unburned upon the land immediately before and immediately after the fire, and the difference between such market values, if any, will be the damage sustained by the plaintiff to this land, and the timber thereon. You are authorized in arriving at this conclusion to take into consideration the location of the land and the timber, its accessibility to market, and the transportation facilities, the quality of the timber, the effect of the

burned timber upon the value of the other timber adjacent to or surrounded by it, together with all the other evidence in the case. To the sum which you may find to be the damage, the plaintiff is entitled to recover the amount of the destruction of this timber, you will add the amount that it expended, or the amount the testimony shows that it expended in fighting these fires and in preventing them from spreading into other and adjoining timber, and to this latter item, you will be justified in adding interest at six per cent, or the legal rate."

(Transcript of Record, page 345.)

Plaintiff in error at the trial complained that the Court in giving the foregoing instruction had used the expression "and the effect of burned timber upon the value of other timber adjacent to it." Exception was taken to that expression upon the ground that it had not been pleaded. Whereupon, the Court further instructed the jury as follows:

"Gentlemen, these instructions were submitted by the counsel, and it may be that in reading them, I read more than I intended to. My attention has been called by Mr. Fenton to the fact that in instructing as to the measure of damages, I said you might

take into consideration the effect the burned timber would have upon the other timber standing adjacent. I did not intend to give that instruction. The question for you to determine is the injury to the timber that was destroyed."

(Transcript of Record, page 348.)

The instruction given fully met the complaint made by the railroad company and enabled the jury to arrive at a verdict in accordance with the law and the facts of the case. Hence there was no error.

The court refused the request of the railroad company to give the following instruction:

"The plaintiff alleges in its complaint, and has introduced some evidence to the effect that the defendant's right of way was not kept clean and free of combustible material liable, by such sparks or coals discharged by its engines, to communicate the fire to the property of others. On that subject I instruct you that the burden of proof rests upon the plaintiff to show that the fire started on the right of way, for unless that fact be established, the alleged negligence of the railroad company in suffering the combustible material to get on its

right of way was not the efficient and proximate cause of the accident, and upon that allegation of negligence the plaintiff would fail."

(Transcript of Record, page 398.)

Of this refusal, error is assigned. The matter was completely covered by the instruction of the court, as shown by the following quotation:

"And then again, if it should appear that the defendant company was negligent in permitting or allowing inflammable material to accumulate along its right of way, and that it was not negligent in the other respects pointed out in the complaint, and to which I have called your attention, it would of course be necessary before you could find it liable for the injury alleged in this case, that the fire originated in this inflammable material and on this right of way. In other words, if the company allowed inflammable and combustible material to accumulate on its right of way, and the fire started somewhere else, not in that material, and it was not the cause of the injury, then while it might be negligent, it was not the negligence causing injury to the plaintiff in this case, and the plaintiff would not be entitled to recover on that account."

(Transcript of Record, page 341.)

In fact the instruction of the court more clearly and emphatically placed the proposition contended for by the railroad company before the jury than requested by it.

The evidence in this case clearly and conclusively supports the verdict and judgment herein. Evidence was given in the case showing beyond question the presence of large quantities of inflammable material upon the right of way, and defects in the fire-arresting devices upon the engines of the railroad company. It was shown beyond doubt that the fires complained of were set by the railroad company and that the timber alleged to have been destroyed was burned by said fires. The only serious contention made by the railroad company was upon the amount of damages that should be awarded the United States.

Upon this question the defendant called witnesses who in part testified as follows:

Testimony of F. Benson

No trees are killed by fire; damage to trees that are from 36 inches to five or six feet is little or nothing for the first two years, then the sap turns black and the loss is about 10 to 25 per cent up to five

years; for the first two years after the fire there is no damage to speak of, and in the third year there is a commencement of discoloration of the sap of the tree; during the third year practically all the sap turns black so that it is not merchantable, and there would be added during the third and up to five years, in his judgment, and from his experience and observation and from his logging in this character of timber, ten to fifteen per cent. In timber such as that described in this case there would be no damage for the first two years after the fire. That the maximum damage to stumpage was from fifty cents to $1.50 per thousand. In some places the coloring of the sap ensues quite soon after the fire, and others it takes some time; the valuation differs in different localities; the maximum or minimum of allowance to be made on burned timber he should say was 20 to 25 per cent, about the average; in purchasing they do not make that allowance in the first year or any other time, he bought timber where he didn't make any allowance because it stood where he could get at it to log it off, * * * If it had been way back he would not have bought it at all. Breakage is larger in dry timber than in green, but does not appear in a pronounced way until three years after the burn occurs. If it were logged in three years it would be worth good money; the relative deduction to be made would be 25 per cent.

(Transcript of record, pages 227, 229, 230, 231 and 232.)

Testimony of E. C. Clair

"Up to the end of the second year there is practically no depreciation; from the second to the fifth year he would say there was a loss of from 25 to 30 per cent. After that it is uncertain, it depends upon the kind of timber. There is no depreciation in value by reason of a fire of that kind up to the end of the second year; then the sap is lost, after that there is no further depreciation for a period of about three years. The second year there is some depreciation as far as the sap is concerned, the sap is lost, after that there is no change to speak of, for three years after that, then a small borer worm gets in and destroys the smaller timber. He figured, in his 30 to 40 per cent estimate, some loss on sap and some in breakage. In either case it was about five years after the trees were killed that the borer worms attacked their red fir, they attack it first near the butt, and thinks they work up, because he did not find them in the top until later; the sap is a total loss at the end of two years, and it is about six years before the worms get into the heart wood of the tree; their progress in the heart wood was more rapid, in their case, as they go through the sap they get strong, and go right in for

all they are worth. (Transcript of Record, pages 304, 305 and 306.)

Robert S. Shaw, manager of the Curtis Lumber Company, testified that he knew where the fires of July 23 and August 11 occurred and knows the section of the country over which the fire run, and is acquainted with the timber in that locality. Has had experience in handling timber that has been burned over in that section of the country. He had some timber belonging to the company of that character, situated in that burned district as shown on the map. They commenced logging directly after the burn, and for the first or about two years did not figure any loss to speak of, and after probably in the third year, the sap commences to color, and by the expiration of the third year, they figure on losing the sap; trees 36 inches in diameter to five feet in diameter would have sap about 1½ inches in thickness; they have manufactured out of burned timber since they have been operating the Curtis Lumber Company, probably about 40,000,000 or 50,000,000 feet; there was scarcely any burned in there before the fire of 1906. They logged an eighty this last winter that was burned during the fire, the loss was probably 25 to 30 per cent. The market value of timber in that vicinity in 1906, he does not think they paid

exceeding fifty cents, he would consider that the market value.

The purchase of the claims of Myer, Kressler and Carlton was made through another member of their company; believes he signed vouchers for them, but the price paid he does not know. Does not remember telling Mr. Hayes, then employed in the Forest Service, that he had purchased these claims and paid more than $1 for it, or more than the Hoover people offered. It is true that he heard the three claims, Kressler, Carlton and Myer, or some of their representatives, offered their claims to Hoover and Company over the telephone for $1.00 per thousand.

His father, John A. Shaw, was secretary of the Corvallis and Eastern Railroad.

(Testimony of Robert S. Shaw, Transcript of Record, pages 235 to 247.)

The Government offered testimony that the timber as a whole was good merchantable timber, after it had been killed by the fire, if it had been logged before the sap wood had decayed. Ordinarily the fire does not eat into green timber to any extent unless it is a very hot fire; if there were any trees that had been sound before the fire they had been utterly destroyed; they were very few.

(Testimony of A. E. Cahoon, Transcript of Record, page 193.)

Testimony of W. A. Hoover

Lived in that country in 1906, had been buying and dealing in timber by the quarter section, in the tree. Thinks he knows the price and market value of merchantable timber in that locality. It would run from sixty cents to $1.50 a thousand by the quarter section. Within a year after the fire had gone through it, the sap would be gone, the worms would be in the sap; that is in a year or two, probably less time, and he would not care about buying it without he had a mill and could use it right away.

(Transcript of Record, page 194.)

H. G. Hayes testified, in 1906, timber in that locality was selling for $1 or more per thousand.

(Transcript of Record, pages 198-201.)

James Taylor, for plaintiff, testified as follows:

A fire has an effect of 25 to 100 per cent upon the value of timber right after the burn, and it takes about five years to make it a total loss; sap rot renders the reduction of value and volume as small as

25 per cent after the fire; sap rot produces it altogether; if one can log it right after it is burned, the loss is not less than 25 per cent. He knew what the value of timber was in that locality, standing timber, before and after this fire. His company figured as the market value from $1.00 to $1.50, according to location of the timber. That is what they allowed for stumpage and logging timber; in Sections 7, 8 and 17, in Township 10-5, merchantable timber such as is used in logging, was of the value of, I should say, about $1.00.

(Transcript of Record, pages 206 to 211.)

Dr. E. A. Lewbaugh testified as follows: Have had occasion to check over estimates that were made just before the fire and just afterwards, and estimates the loss at, in volume, at between 20 and 30 per cent, which is as near as you can figure. This work was done within the first year. Have not had occasion to go over any in the second year.

He would think the general loss would run any where from 25 to 40 per cent, 40 per cent to include a fair amount of breakage. That would be the total loss from the loss of sap and so on, and would extend over a period of, say ten years, after the fire. I would consider the loss of value even greater; I would

consider it as high as 50 per cent, depending upon the percentage of burned area and the green area. In this particular locality I consider the danger even greater from a speculative standpoint on account of the proximity of the railroad; not only due to the fact that the railroad is there, but to the fact that it is a traveled highway — people passing up and down there all the time. If it was off in an isolated place, in a cul-de-sac, where people were not going by, it would be of better value than to be near a traveled highway. Another thing, they are operating in there constantly in that vicinity. The danger of recurrent fires over the logged over lands, of course, everybody can see that they are greater.

(Transcript of Record, pages 211 to 224.)

As hereinbefore pointed out, the Government was unable to sell the burned timber mentioned, notwithstanding a diligent effort was made to do so. The evidence disclosed that if there had been an available market for this timber immediately after the fire, the loss sustained by the Government would have varied anywhere from 15 to 50 per cent of the value of timber standing, green, and that if not sold within five years the loss would be anywhere from 50 per cent of the full value of green timber to a total loss thereof.

At the time of the trial, three years and a half after the fire occurred, no sale of the timber had yet been made and there existed very slight prospect for any sale of a substantial quantity of said timber within any reasonable time. The jury, however, from this wide range of value, awarded the Government approximately 35 per cent of the value of the timber as it stood at the time of the fire. The jury could not well have reached a verdict for a less amount under the evidence in the case, but might well have found a much larger sum in favor of the Government. The jury could not have adopted any reasonable theory of the case under which it could have arrived at a verdict against the United States. It is not anywhere claimed by the railroad company that a verdict should have been rendered in its favor; the only complaint is that some certain errors were committed in reaching a correct verdict. The record purports to, and does in substance, contain all the evidence in the case and clearly establishes the correctness of the verdict.

Under these circumstances, even though there be some slight error in some of the Court's rulings, the judgment being right, on the merits, will not be reversed.

Henderson Bridge Co. v. McGrath, 134 U. S. 260.

Grimes Drygoods Co. v. Malcom, 164 U. S. 485.

Mobile Railway Co. v. Jurey, 111 U. S. 584.

Barber Asphalt Paving Co. v. Odez, 85 Fed. 754.

The judgment in this case should be affirmed.

Respectfully submitted,

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Assistant United States Attorney for the District of Oregon.

STATE OF OREGON, }
County of Multnomah. } ss.

Due and legal service of the foregoing brief is hereby accepted and the receipt of a true copy thereof is hereby acknewledged.

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Attorneys for Plaintiff in Error.

STATE OF OREGON, }
County of Multnomah. } ss.

I, John McCourt, hereby certify that I am United States Attorney for the District of Oregon and attorney for defendant in error in the within entitled action; that I prepared the foregoing copy of brief and have carefully compared the same with the original thereof and it is a true and correct transcript of the said original and the whole thereof.

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